Memorandum

U.S. Department
of Transportation

**Federal Railroad
Administration**

Date: DEC 23 2004

Reply to Attn. of: S-04-01

Subject: Application and Enforcement Guidance
Related to Interpretation of Periodic Testing Intervals

From: Grady C. Cothen, Jr.
Acting Associate Administrator for Safety

To: All Regional Administrators, Deputy Regional Administrators, S&TC Specialists, SACP Project Coordinators, and All Federal and State Program Managers and Personnel

This bulletin is in regard to the FRA letters of October 12, 2004, of response to CSX Transportation and the Brotherhood of Railroad Signalmen, signed by S. Mark Lindsey, FRA's Chief Counsel. These letters were recently forwarded to all FRA regions and I believe there is a need for this related guidance.

The letters were written as formal legal interpretations from FRA's Office of Chief Counsel in response to specific inquiries from a railroad and a labor union, and were intended to clarify the meaning of the associated terms found in the regulations. A specific term in the letters regarding what was intended in the reference to the definition of the word "month" (i.e., once each month, monthly, once every month, etc.) has prompted considerable discussion from some railroads as well as FRA field personnel. The letters stated that "once each month" would be defined as either 30 or 31 days for the purpose of interpreting testing intervals. The letters also state "under this interpretation, whenever any interval of more than 30 days has gone by with no test being performed, a violation would occur." The use of the term "violation" in this sentence was not intended to denote civil penalty enforcement action, i.e., a recommendation for a civil penalty, but rather a condition of noncompliance. A railroad certainly may be "in violation" of a Federal requirement without a civil penalty recommendation being pursued.

In the past, there may have been a difference of opinion within FRA, and perhaps in the railroad industry as well, about this interpretation. However, no documentation could be found that stated clear guidance until the issuance of these letters. In our ongoing effort for consistency, we should continue to approach enforcement of these interpretations in a manner that will ensure a thorough understanding by the railroad industry. Initially, our foremost objective should be one of guidance and education to personnel affected by the regulations.

The interpretation provided by the Office of Chief Counsel is **not** new and should not be represented as such. The FRA had never provided clear written guidance on the meaning of these terms until the issuance of these letters. It is important that railroads be made aware of this interpretation to avoid any future confusion and FRA is considering the best ways to accomplish that, including the possibility of posting the interpretation on our website.

In our on-going effort for consistency, we should continue to approach enforcement of these provisions consistent with these interpretations in a manner that will ensure a thorough understanding by the railroad industry. Initially, our foremost objective should be one of guidance and education to personnel affected by the regulations. For railroads that have been proceeding under a different understanding of the regulation, some time will obviously be required for them to adjust to the legal interpretation. While the process of adjustment is underway, and to the extent it is clear that the railroad is making the appropriate response, it will serve little purpose to spend time documenting large numbers of deviations from the regulation as interpreted.

After a reasonable period has been provided for adjustment, we will apply the regulation as any other regulation would be applied. The FRA policy on enforcement discretion remains as it has been. When conditions of noncompliance are identified, an accurate record of such conditions should be made on an inspection report (i.e., citing deficiencies). Determining an appropriate level of enforcement action may require that various factors be considered regarding whether such conditions merit civil penalty recommendations. These factors include the inherent seriousness of the condition or action, a railroad's normal or general intent to comply with relevant regulations, and the degree of potential safety hazard a condition or action poses. (See 49 CFR Part 209, Appendix A.)

The content of both the BRS and CSX letters is identical and the electronic version of the BRS letter is as follows:

U.S. Department
of Transportation
**Federal Railroad
Administration**

1120 Vermont Ave., N.W.
Washington, D.C. 20590

W. Dan Pickett
International President
Brotherhood of Railroad Signalmen
601 W. Golf Road - Box U
Mount Prospect, Illinois 60056

Dear Mr. Pickett:

I am writing in response to your letter requesting a legal interpretation of language in 49 C.F.R. Parts 234 (concerning grade crossing signal systems) and Part 236 (concerning signal and train control systems) requiring various tests at monthly, quarterly, and annual intervals. You sent your request to FRA's Office of Safety. Please direct requests for formal legal interpretations to this office.

Your inquiry specifically requested FRA's view on the meaning of the identified intervals in reference to the CSXT waiver allowing the use of palm pilots and PDAs to record such tests and the need to properly program the intervals into these instruments. Your letter also references an earlier letter from officials at CSXT to the FRA's Signal and Train Control division requesting the same interpretation and detailing CSXT's understanding of the meaning of these terms informally provided by FRA during an April 16, 2003 meeting in Jacksonville, Florida.

The terms *monthly* and *quarterly* are not used in Part 234 or 236 and *annually* appears only twice. Part 234 uses the terms *once each month*, *once every three months*, and *once every twelve months*, and, in one instance, the term *annually*. Part 236 uses a wider variety of terms such as *once each month*, *once every three months*, *once a year*, *once every year*, *once every twelve months*, and, in one instance, the term *annually*. FRA believes it is clarification of these terms that you are seeking.

Because the terms are not defined in either rule and the meaning not discussed in the preamble to either regulation, our reading of the terms is based on their plain meaning, as informed by the purpose of the safety rules in which they are found. The purpose of the requirements in both parts is to ensure timely testing and inspection of safety-critical devices at regular intervals in order to ensure that those devices are able to perform their intended functions and, if they are not, that they are removed from service. See 49 C.F.R. §§ 234.247 and 236.101.

Legal provisions that require periodic actions "once each" or "once every" period are susceptible to two possible readings. One reading is that "once each" period means at any time during the relevant calendar period. For example, "once each month" could mean once at any time in October, once at any time in November, etc. Under that reading, however, a test could occur on October 1, and the next test could occur on November 30. This would permit an elapsed period between tests of 60 days.

Ordinarily, when such leeway is intended, a requirement would include the word "calendar" (e.g., "once during each calendar day," 49 C.F.R. § 229.21(a)) in order to make clear that the required action may be performed at any time within a given calendar period.

Where such leeway to perform the required action at any time within a given calendar period is not specifically provided for, the reading that most clearly fulfills the safety purpose of such requirements is one that mandates the required action be performed at least once in any period of the given length, whether or not a calendar day, month, or year. Under this reading, if any period of the specified length passes during which the required action was not performed, there is a failure to comply with the requirement. For example, if a test were required "every two years" (see, e.g., tests for electric locks in § 236.105), the second test would be due no later than the second anniversary of the first test, so that no period longer than two years would elapse without the test having been performed. This reading is not only more consistent with the safety purpose of the rules in Parts 234 and 236, but is also more clearly consistent with the plain meaning of the relevant terms.

The dictionary definition of the word "month" is:

> 1: a measure of time corresponding or nearly corresponding to the period of the moon's revolution: as **a**: a period of approximately four weeks, 30 days, or 1/12 of a year . . ., **b:** one of the twelve portions into which the year is divided in the Gregorian calendar . . . **c:** a period of time about the length of a lunar month but not necessarily coinciding with a calendar month . . .

Merriam-Webster's Collegiate Dictionary (10th ed. 1999).

Another dictionary includes in its definition of "month" "the time from any day of one calendar month to the corresponding day of the next." The Random House College Dictionary (revised ed. 1980).

Based on these definitions and the purpose of the relevant provisions of Parts 234 and 236, I believe the best reading of *once each month* is that it means one time during each 30 days, or, because some months have 31 days, one time within the period starting with a date in one calendar month and ending on the corresponding date in the next month, whichever is longer. For example, under a rule requiring a test once each month, if a test were performed on January 31, the next test could be performed as late as late as March 2, which is 30 days later (assuming a February of 28 days). If a test were performed on February 28 (in a non-leap year), the next test could be performed as late as March 30 (i.e., within 30 days), and would not have to be performed by March 28. A test could be performed on May 5th and subsequently performed on or before June 5th and be in compliance with this regulation (even though no test occurred in the 30 days from May 6th through June 4th). Under this interpretation, whenever any interval of more than 30 days has gone by with no test being performed, a violation would occur. Were a railroad to perform a test on May 5th and not perform the next test until June 10th, the railroad would violate the rule because a period of more than 30 days would have gone by with no test.

Accordingly, the term *once every three months* means one time during any period of three months, which means once in any period of 90 days, or once in any period starting with the date of the first test and ending on the same date three months later, whichever is longer. Because there are no three consecutive months of 31 days each, but at most just two such months in any three-month period, this interval will be no more than 92 days. If a test were performed on January 30, the next test would be due no later than April 30. If a test were performed on February 28, the next test would be due May 29

(given the few days in February, the 90-day period is actually longer than the period from February 28 through May 28).

The final terms to be construed are *once a year*, *once every year*, *once every twelve months,* and *annually*. The dictionary defines "year" to mean:

> **2 a:** a cycle in the Gregorian calendar of 365 or 366 days divided into 12 months beginning with January and ending with December **b:** a period of time equal to one year of the Gregorian calendar but beginning at a different time...

Merriam-Webster's Collegiate Dictionary (10th ed. 1999).

The dictionary defines "annual" to mean the following:

> **1 :** covering the period of a year **2 :** occurring or happening every year or once a year...

Id.

The word "annually" is the adverb derived from the word "annual".

Here again, I believe the best reading of these terms is that they require tests to occur at least one time during every period of a year's length (rather than at any time during one calendar year, at any time during the next calendar year, etc.). Accordingly, a test performed on May 5th must be performed again on or before May 5th of the following year.

We believe this interpretation of these various terms is consistent with how FRA has enforced these rules over the years. Although informal guidance provided orally at the April 16, 2003 meeting differed in one respect (FRA staff present at that meeting apparently thought that a monthly inspection could be performed at any time in a calendar month) from what is presented here, that guidance was not intended to be a formal legal interpretation.

Of course, FRA rules establish minimum standards and railroads are free to adopt and enforce additional or more stringent requirements that are not inconsistent with the rule (see, e.g., § 234.1). So, a railroad would be free to establish testing schedules on more frequent intervals than those that appear in Parts 234 and 236.

We are hopeful that this clarification assists you in better understanding the requirements of Parts 234 and 236. I am sending a letter conveying the same information to the CSXT.

Sincerely,

(Signed by)
S. Mark Lindsey
Chief Counse